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Supreme Court, U.S.
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No. 96-1503

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PAMELA J. MCLEOD, Petitioner,

v.

OREGON LITHOPRINT, INC., dba News-Register Publishing Co.; and NEWS-REGISTER EMPLOYEES' INSURANCE PLAN, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

Cases

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REASONS FOR GRANTING PETITION

PETITIONER'S REPLY

The initial question presented for review is whether the ERISA provision permitting "appropriate equitable relief" includes the monetary recovery of lost benefits resulting from a breach of a fiduciary's duties to a participant.

Respondent's Opposition Brief to the Petition for Certiorari illustrates the differing approaches to the question which will ultimately have to be resolved by this Court.

Respondent argues for the approach adopted by the Ninth Circuit which holds that common law trust remedies to restore lost benefits would constitute "compensatory damages" and are therefore unavailable. Respondent and the Ninth Circuit rely upon an extension of this Court's decision with respect to claims against non-fiduciaries in Mertens v. Hewett & Assoc. 508 U.S. 248 (1993) to include all claims against plan fiduciaries under any circumstances.[1]

Contrary to Respondent's argument, it is not necessary to overturn Mertens in order to decide the question presented in this case. Petitioner's position in the case is entirely consistent with this court's holding in Mertens which expressly recognized that the scope of "appropriate equitable relief" must be determined under the circumstances of each case. Mertens 1135 S.Ct. 2068-69. The Mertens decision involved the conduct of a non-fiduciary and does not reach the question of whether negligent fiduciaries may be charged with the restoration of benefits lost as a result of

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[1] The contrary view which has been applied by the Third, Sixth and Eighth Circuits holds that common law trust remedies which may impose liability on a plan fiduciary to restore lost benefits should be applied to place the beneficiary in the position he or she would have been if the trustee had not committed a breach of trust. See: Restatement (Second) of Trusts, Section 205, comment a (1959)(". . . trustee ...chargeable with any loss ... resulting from a breach of trust).

their breaches.

Any resolution of the issue must also be consistent with Varity Corp. v. Howe, 516 U.S. ___ (1996) in which 29 U.S.C. Section 1132(a)(3) was recognized as a catch-all safety net which must be available to provide a remedy for breaches of fiduciary duty where no other remedy exists under the statute.

Respondent asserts that no "true inter-circuit" exists with respect to the question of whether lost benefits may be restored as appropriate equitable relief. However, Respondent does not explain how the Eighth Circuit decision in Howe v. Varity Corp, [2] and the Third Circuit's decision in the case of In re Unisys Corp. Retiree Medical Benefits "ERISA" Litig. [3] can be reconciled with the Ninth Circuit's view in McLeod. [4]

Respondent relies on Hein v. F.D.I.C., 88 F.3d. 210 (3rd Cir. 1996) to suggest that the Third Circuit view with respect to the recovery of lost benefits is not in conflict with the Ninth Circuit. In Hein, the plaintiff was attempting to recover amounts which he was not entitled to receive under the Plan. Because no connection was shown in Hein between any breach of fiduciary duty and the fact that plaintiff was not entitled to benefits, the case never reached the question of whether plaintiff was entitled to recover benefits for which he had been wrongfully deprived. The court in Hein did not refer to or question the validity of the approach or the holding in the Unisys case.

The current status of the Sixth Circuit's position on this issue is less clear. The Sixth Circuit's decision in Warren adopted an approach similar to that adopted by the Third and Eighth Circuits. A later panel of the Sixth circuit indicated in

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[2] 36 F.3d. 746, clarified 41 F.3d. 1263 (1995), other issues aff'd 516 U.S. ___ (1996)

[3] 57 F.3d. 1255 (3rd Cir. 1995), cert. den. 116 S.Ct. 1316 (1996)

[4] Both the Third Circuit and Eighth decisions were issues after Mertens.

dicta that it believed that the Warren decision was overruled by Mertens. See: Fraser v. Lintas: Campbell-Ewald, 56 F.3d. 722, 725 (6th Cir. 1995). However, the decision in Fraser was decided on other grounds and the court never actually reached the question at issue here.

Respondent attempts to distinguish this case from the decisions of the Third and Eighth Circuits because the benefits here were to have been provided from an insurance policy rather than from the general assets of the employer as in the other cases. Respondent states:

> "...[T]hose were all actions to recover wrongfully withheld benefits from the benefit provider, not, as here, actions for damages from some third party measured by the lost benefits." (Opposition Brief, p. 4)

It is extremely significant that the "some third party" which Respondent refers to in the above quotation is the Plan Administrator and a fiduciary charged with the duty of acting an the best interests of the participants. In both Howe v. Varity Corp, and Unisys, the liability was placed upon the defendants due to their actions as plan fiduciaries and not because they had agreed to provide benefits under the terms of the plans from their general assets. The fact that Respondent's plan provided for benefits to be paid from an insurance policy rather than from the general assets of the employer is not relevant to Respondents liability as a fiduciary.

Respondent incorrectly suggests that the question of whether of not the fiduciary should be surcharged in the amount necessary to restore the lost benefits has not been raised by the pleadings, briefed or decided by the court of Appeals. To the contrary, the Court of Appeals specifically noted the relief requested in the Amended Complaint [5] and described the Plaintiff's claim as seeking to be made whole

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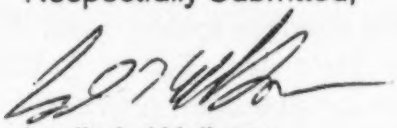
[5] See: Petition for Cert., App. "B," p. 12.

through a recovery of an amount equal to her lost benefits.[6]

Dated this 25th Day of April, 1997

Respectfully Submitted,



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[6] "...[S]he seeks to be made whole through an award of money damages equal in amount to the benefits that she would have been paid and compensation for her emotional distress." See: Petition for Cert., App., "A," p. 4.